No. 22249

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KARL HINES NARTEN,

Appellant,

vs.

FRANK A. EYMAN, Superintendent
ARIZONA STATE PENITENTIARY,

Appellee.

APPELLEE'S ANSWERING BRIEF

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State of Arizona

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I N D E X

CASES AND AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

Appellee accepts appellant's jurisdictional statement.

STATEMENT OF FACTS

The statement of facts set out by appellant in his brief is essentially accurate and is accepted for purposes of this appeal. Appellee would, in addition, specifically incorporate herein by reference the facts as found by the District Court and by the Arizona Supreme Court in their

opinions. To avoid unnecessary duplication, specific evidentiary facts will be set out in the argument portion of the brief as required.

CONSTITUTIONAL PROVISIONS INVOLVED AND QUESTIONS PRESENTED

Appellee accepts appellant's presentation of these matters in his brief.

ARGUMENT

I

APPELLANT RECEIVED A FAIR TRIAL BY A COMPLETELY IMPARTIAL JURY, ADEQUATELY PROTECTED BY THE JUDGE FROM OUTSIDE INFLUENCE, AND FREE FROM ANY PREJUDICIAL TAINT AS A RESULT OF PRETRIAL PUBLICITY.

Murder, sex, mystery and an old-fashioned western chase and capture in old Mexico made this case very newsworthy, in much the same way "murder and mystery, society, sex and suspense" focused the news media upon Dr. Samuel Sheppard, Sheppard v. Maxwell, 384 U.S. 333, 356, 16 L.Ed. 2d 600, 616, 86 S.Ct. 1507. There the analogy ends.

No one can read any version of the facts, either from the opinion of the Arizona Supreme Court, State v. Narten, 99 Ariz. 116, 407 P.2d 81, the order of the district court

herein, or as set out in appellant's brief, and come to any other conclusion but that we are not here concerned with the Sheppard decision reincarnated, or anything close to it.

The vast bulk of the lurid publicity in the case occurred at the time of the killing, the subsequent chase and capture in Mexico, and the return of appellant to Tucson for preliminary hearing. After the preliminary hearing the publicity dropped off almost completely until trial, when it again increased.

Each juror was carefully questioned on voir dire. There was no disclosure of any "pattern of deep and bitter prejudice", Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639. Indeed, only forty-nine jurors were required to be questioned to obtain the necessary thirty-two prospective jurors prior to the exercise of ten peremptory challenges allowed each side, Rule 225 (1), Arizona Rules of Criminal Procedure, 17 A.R.S. (In Irvin v. Dowd, supra, 430 persons were voir dired in 2,783 pages of transcript to arrive at a jury). It is questionable whether the number of jurors questioned in this case

prior to the empanelment of the trial jury is even average for a cause wherein either the death penalty or life imprisonment can be imposed.

As was stated by the United States Supreme Court in Irvin v. Dowd, supra:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, supra, 366 U.S. at 722.

Nothing in the later decisions in Estes v. Texas, 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628; Sheppard v. Maxwell, supra, has lessened the import of this language as it be applied to the case at bar.

It has always been the law that the trial court judge has a wide degree of discretion in determining the impar-

tiality of a juror and in weighing the reasons for granting a continuance or change of venue. Hilliard v. State of Arizona, 362 F.2d 908 (9th Circ. 1966); State v. LeVar, 98 Ariz. 217, 403 P.2d 532; Ungar v. Sarafite, 376 U.S. 575, 11 L.Ed.2d 921, 84 S.Ct. 841.

In a sense, especially in pressing the importance of the testimony of Dr. Tharp, appellant does not really argue that any juror was improperly seated under the law, either as expressed by the Arizona Supreme Court, or by the United States Supreme Court, but simply that in a case such as this, an accused, in all probability cannot get an absolutely impartial jury to try him and therefore the whole procedure is unfair.

The Tenth Circuit characterized the problem well in Welch v. United States, 371 F.2d 287 (10th Circ. 1966), a case involving the prosecution of a prominent jurist for income tax evasion:

> "Fairness in the administration of justice is not a one-way street to be approached only through an entrance limited to the accused. His cause cannot be submitted to automated jurors existing in complete sterility." 371 F.2d at 291

Quite clearly the procedures adopted by the judge to

insure the fairness of this trial and the impartiality of this jury were reasonably directed toward and effective for the accomplishment of that purpose. Hilliard v. State of Arizona, supra. There is no way that the action or inaction of the trial court in this case can, under any legitimate view of the facts, be magnified into a denial of appellant's Federal Constitutional guarantees of a fair trial by an impartial jury of his peers.

II

NOTHING IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRES THE STATE TO PROSECUTE APPELLANT ONLY BY GRAND JURY INDICTMENT.

Appellant claims that there is a trend in the direction of holding that rights guaranteed by the first ten amendments are secured to the citizen from violation by the states by virtue of the Fourteenth Amendment; and that this Court should find, in anticipation of such finding by the United States Supreme Court, that prosecution by preliminary hearing is a violation of due process.

Article 2, § 30 of the Constitution of the State of Arizona provides as follows:

> "No person shall be prosecuted criminally in any court of record for felony or misdemeanor,

otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."

This constitutional provision is implemented by Rule 78, Rules of Criminal Procedure, 17 A.R.S. 192, which provides as follows:

"A. Every felony and every misdemeanor of which the superior court has original jurisdiction shall be prosecuted by indictment or information, and every misdemeanor may be prosecuted by indictment or information." (Emphasis supplied)

The United States Supreme Court in holding that prosecution by information is constitutional the Court used this language in Hurtado v. California, 110 U.S. 516, 28 L.Ed. 232, 4 S.Ct. 111:

"Tried by these principles we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."

Maxwell v. Dow, 176 U.S. 581, 44 L.Ed. 597, 20 S.Ct. 448, used this language:

"The objection that the proceeding by information does not amount to due process of law has been

heretofore overruled, and must be regarded as settled by the case of Hurtado v. California, 110 U.S. 516. The case has since been frequently approved. Hallinger v. Davis, 146 U.S. 314, 322; McNulty v. California, 149 U.S. 645; Hodgson v. Vermont, 168 U.S. 262, 272; Holden v. Hardy, 169 U.S. 366, 384; Brown v. New Jersey, 175 U.S. 172, 176."

The Missouri case of State v. Waller, 382 S.W.2d 668, involved a murder prosecution by information which was affirmed. The Court said:

"Finally, appellant's claim that he could have been charged with a capital offense only by an indictment, and not by an information is obviously without merit. . .The requirement of the Fifth Amendment to the Constitution of the United States has no application to state procedure in this regard. Hurtado v. California, 110 U.S. 561, 534, 4 S.Ct. 111, 28 L.Ed. 232; State v. Cooper, Mo. Sup. 344 S.W.2d 72 (1-3)."

See also, Horner v. State, 168 So.2d 137 (Fla.)

There is a strong trend in the decisions of the Supreme Court toward preserving to the citizen substantial rights from which he may benefit. It is not a trend toward the preservation of ancient forms, where newer forms have bestowed substantial benefit upon the citizen charged with crime.

Rule 16, Rules of Criminal Procedure, 17 A.R.S. 9.4, provides that a defendant brought before a magistrate after

arrest on a felony charge, has a right to an immediate preliminary examination in order to determine whether or not there is probable cause to believe the defendant is guilty of any offense.

The defendant has a right to have counsel present at such examination. (Rules 16, 18, 19) He has the right to have witnesses summoned, to have their testimony heard, and to have them sequestered. (Rules 22, 26, 27) All witnesses shall be examined in the presence of the defendant and may be cross-examined. (Rule 23) The defendant may make a statement concerning the charges against him, and may answer the charge and explain the facts appearing against him. (Rule 24) He may order a transcript of the entire proceedings. (Rule 28)

If the Rules of Criminal Procedure are not followed, or if the evidence is not sufficient to support a finding of probable cause, relief is available by habeas corpus and motion to quash. State ex rel Corbin v. Superior Court, In and For the County of Maricopa, 100 Ariz. 236, 413 P.2d 264, opinion modified on rehearing 100 Ariz. 362, 414 P.2d 738. Defense counsel usually ask for and obtain

a preliminary hearing for the purpose of learning the nature of the prosecutor's case. State v. Essman, 98 Ariz. 228, 403 P.2d 540, at 542.

Grand jury proceedings are secret. The defendant has no right to be present; his counsel may not be present; defendant may not have witnesses present, nor cross-examine the witnesses against him. There is even no absolute right to a transcript of the proceedings. The preliminary hearing, rather than violating the standard of due process, has raised a new standard of fairness to the accused and has placed new burdens on the prosecution and new protection around the rights of the accused.

III

IT IS NOT AN UNREASONABLE CLASSIFICATION TO ALLOW A JURY OF LAYMEN TO ASSESS PUNISHMENT UPON DIFFERENT EVIDENCE THAN WOULD BE AVAILABLE TO A JUDGE, WERE THE QUESTION PUT TO HIM.

It is unquestionably the law in Arizona that no evidence in mitigation can go into evidence in a first degree murder case tried to a jury, unless it has some relevancy toward proving the accused's guilt or innocence, including the proper grading of the offense. State v. Narten,

99 Ariz. 116, 407 P.2d 81; Campbell v. Territory, 14 Ariz. 109, 125 Pac. 717. It is equally true that evidence concerning aggravation cannot be introduced before a jury against a defendant, unless it too has some relevance toward proving guilt or innocence, or grading the offense. Turley v. State, 48 Ariz. 61, 59 P.2d 312.

On the other hand, if the accused pleads guilty, the trial judge may take into consideration many things, both favorable and unfavorable to the defendant which the jury may not, in determining which of the two punishments to assess. State v. Jones, 95 Ariz. 4, 385 P.2d 1019, rendered void on habeas corpus proceedings in other grounds. Jones v. Eyman, (No. 20,054, 9th Cir., Nov. 24, 1965) ___ F.2d ___; Rules 336 and 187, Rules of Criminal Procedure, 17 A.R.S.

While it must be very evident that many items of information about the defendant may come in during the disclosure of the crime itself and the circumstances surrounding it (e.g., State v. Coey, 82 Ariz. 133, 309 P.2d 260; DeWoody v. State, 21 Ariz. 613, 193 Pac. 299; Sullivan v. State, 47 Ariz. 224, 55 P.2d 312; Short v.

State, 53 Ariz. 185, 87 P.2d 266; State v. Robinson, 89 Ariz. 224, 360 P.2d 474), it is true that the jury must base its determination as to punishment solely upon the facts legitimately admissible to prove the crime itself and the circumstances surrounding it. Is this an unreasonable classification within the meaning of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution? Obviously it is not.

Appellant's argument on the question presented may be somewhat persuasive of the proposition that the law ought to be amended so that evidence in mitigation of punishment might be presented to a jury. His argument, however, falls far short of establishing that Arizona's procedure denies him equal protection or due process.

Appellant questions the propriety of a trial in which a jury passes on the question of guilt and the question of penalty based on the same evidence. In Pope v. United States, 372 F.2d 710 (8th Circ. 1967) the court stated:

> "Our conclusion is fortified by the supreme court's very recent remarks in Spencer v. State of Texas, 385 U.S. ___, 87 S.Ct. 648, 17 L.Ed. 2d ___ (1967) about two-stage jury trial

> procedure. There, Mr. Justice Harlan, author of the principal opinion, said, 'Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.' " 372 F.2d at 370.

(Spencer v. Texas is found at 385 U.S. 554, 17 L.Ed.2d 606, 87 S.Ct. 648.)

The legislature of Arizona has determined that the choice of penalty in first degree murder shall be on the basis of an attempt to make the punishment fit the crime, rather than the criminal. It has decreed that the determination is to be based on the facts admissible to prove the crime itself and the circumstances surrounding it, rather than the facts of the defendant's history and personality. Nothing in either state or federal constitutions prohibits such a classification, however much some present day penologists may question the wisdom of such a proceeding.

IV

UNDER ARIZONA AND FEDERAL LAW, PETITIONER WAS NOT PRECLUDED FROM PUTTING ON PROPER DEFENSIVE EVIDENCE.

In spite of its direction and phraseology, petitioner's argument is directed against the M'Naghten Rule

for the determination of criminal responsibility, which is the law in Arizona, State v. Narten, supra; State v. Schantz, 98 Ariz. 200, 403 P.2d 521.

It is submitted that the series of California cases cited, and particularly People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492, is a not-too-heavily veiled attempt by the California Court to force the legislature to adopt a different test for criminal responsibility.

A careful reading of Schantz, supra, together with Dr. Beaton's proferred testimony (Transcript of Record, Volume 1, Exhibit E) will clearly indicate the soundness of the Arizona court's reasoning why this offered evidence was not competent under M'Naghten and why M'Naghten is still the best test available. One answer of Dr. Beaton is particularly enlightening:

> "A. The opinion again is two-fold. I am not sure intellectually he did not appreciate his acts, but I think because of his personality controls, he lacked the capacity to conform his behavior to the commands of the law." (Transcript of Record, Volume 1, Exhibit E, supra; Trial Transcript, pp. 1385-1386.)

Clearly, Dr. Beaton's testimony, on the whole, supports a conclusion that any deficiency in petitioner's

mental processes went to his volitional processes and not his perceptive and cognitive processes, and thus, evidence of this lack of volitional control would be inadmissible under a proper interpretation of M'Naghten, State v. Schantz, supra.

The United States Supreme Court has held the M'Naghten test to be constitutionally sound. Leland v. Oregon, 343 U.S. 790, 96 L.Ed. 1302, 72 S.Ct. 1002. There is no valid or subsisting reason to change that position at this time. Mr. Narten knew full well what he was doing at the time of the shooting.

In weighing these conflicting values and compelling interests of both society and the individual, it is to be hoped that the interests of all the Rickel Hansons of this land, past, present, and future, whose constitutional rights are rather abruptly terminated without due process or possible appeal, would receive extensive and careful consideration.

V

PETITIONER'S STATEMENT WAS PROPERLY RECEIVED INTO EVIDENCE, NOT BEING VIOLATIVE OF ANY GUARANTEE OF THE FEDERAL CONSTITUTION.

Clearly this statement does not fall within the

scope of Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602; Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758; or Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199, There was no compulsion, no interrogation, no state action whatsoever. The conference was arranged solely for the convenience of appellant's wife, who worked late hours.

Any privilege related to the fact of marriage was waived when the participants held the conversation knowing a third party to be present. (Trial Transcript, hereinafter referred to as T.T., pp. 971-977). De Leon v. Territory, 9 Ariz. 161, 80 Pac. 348. There is no evidence of surreptitious eavesdropping; the officer was merely insuring the continued custody of this man charged with a capital offense. The petitioner was talking to his wife. At times they would both ask questions of the officer (T.T., p. 972). He was in no way questioning the petitioner. He was only present for security reasons (T.T., p. 977).

It must also be stated that the substance of this conversation was not brought out in the direct examination

of this witness by the State. It was only after the facts of the conversation were alluded to in cross-examination that this statement was forthcoming on redirect examination (T.T. 959-961). The petitioner cannot complain of this evidence interjected into the proceedings at his insistence, where it is clear the State made no effort to obtain the statement, and did not attempt to introduce it as prima facie proof.

CONCLUSION

Appellant received a full and fair trial by an impartial jury of his peers. Every right guaranteed to him by both State and Federal Constitutions was judiciously protected at every stage of the proceedings. The order of the United States District Court denying appellant's petition for writ of habeas corpus should be affirmed.

Respectfully submitted,

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The Attorney General

GARY K. NELSON
Assistant Attorney General

Attorneys for Appellee

STATE OF ARIZONA)
) ss.
County of Maricopa)

GARY K. NELSON, being first duly sworn upon oath, deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

s/ Gary K. Nelson
GARY K. NELSON

SUBSCRIBED AND SWORN to before me this 11th day of December, 1967.

s/ Maria E. Doyle
Notary Public

My Commission Expires:

12-4-70

Copy mailed this 11th day of December, 1967, to:

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By s/ Gary K. Nelson
GARY K. NELSON